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Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

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Committee against Torture

Decision adopted by the Committee under article 22 of the Convention, concerning communication No. 727/2016*, **

Submitted by:	A.B. (represented by counsel, Hana Frankova)
Alleged victim:	The complainant
State party:	Germany
Date of complaint:	5 February 2016 (initial submission)
Date of present decision:	9 August 2018
Subject matter:	Deportation to Belarus
Substantive issue:	Risk of torture upon return to country of origin (non-refoulement)
Procedural issue:	Level of substantiation of claims
Article of the Convention:	3

1.1 The complainant is A.B., a national of Belarus born in 1979. His asylum application was rejected in Germany and he risks extradition due to ongoing criminal proceedings against him in Belarus. He claims that his extradition to Belarus would constitute a violation by Germany of article 3 of the Convention. He is represented by counsel. Germany made the declaration under article 22 of the Convention on 19 October 2001.

1.2 On 10 February, pursuant to rule 114 of its rules of procedure, the Committee, acting through its Rapporteur on new complaints and interim measures, requested the State party not to expel the author while the complaint was being considered.[1]

Factual background

2.1 The complainant claims that he was detained by the Belarusian police for transporting flyers with political content[2] for 45 days and that his car was confiscated.[3] He claims that he was severely beaten[4] and mistreated by the police officers when he was in

* Adopted by the Committee at its sixty-fourth session (23 July–10 August 2018).

** The following members of the Committee participated in the examination of the communication: Essadia Belmir, Felice Gaer, Abdelwahab Hani, Claude Heller Rouassant, Jens Modvig, Ana Racu, Diego Rodriguez-Pinzón, Sébastien Touzé, Bakhtiyar Tuzmukhamedov and Honghong Zhang.

[1] On 15 March 2016, the Committee, acting through its Rapporteur on new complaints and interim measures, denied the request of the State party to lift the interim measures.

[2] In support of the presidential candidate Mr. Alexander Milinkevich.

[3] No supporting documents were provided in relation to his depravation of liberty.

[4] No claim of "severe beating" was made in the case brought by the complainant before the European Court of Human Rights.

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custody. After his release, the complainant alleges that his house was searched several times by the police since he was suspected of transporting flyers from Poland to Belarus. Following one of his trips to Poland, the police interrogated him and showed him a video in which he crossed the Polish-Belarusian border; they alleged that he was bringing flyers to Belarus. The complainant claims that the police threatened to arrest him for drugs-related crimes. The complainant states that he was subsequently convicted in absentia for smuggling.[5]

2.2 The complainant arrived in the Czech Republic and applied for asylum there on 28 October 2006. His application was rejected by the Ministry of the Interior due to a discrepancy in the complainant's statements concerning his conviction.[6]

2.3 In 2010, the European Court of Human Rights issued an interim measure against the Czech Republic and suspended the complainant's extradition to Belarus.[7] As a consequence, on 23 April 2010, the District Court of Pilsen ruled that the extradition of the complainant was not permissible. It also noted that, based on the facts and evidence submitted, that there was good reason to fear that the criminal proceedings against the complainant in Belarus would not be in accordance with articles 3 and 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights). The Czech authorities granted the complainant a subsidiary protection status for a period of one year, which was subsequently extended every two years,[8] noting that the risk of torture or inhuman or degrading treatment could not be excluded.

2.4 On 17 October 2013, the European Court found that the Czech Republic would violate article 13, in conjunction with article 3, of the European Convention on Human Rights by extraditing the complainant to Belarus.[9]

2.5 On 17 October 2015, the complainant was arrested by the German border police when he was crossing the Czech-German border. The arrest was based on an extradition request issued by the Belarusian authorities for a drug-related crime he had allegedly committed in 2006. On 23 November 2015, the Senate of the Higher Regional Court of Dresden decided to allow the complainant's extradition, relying on diplomatic assurances issued by the Belarusian authorities to the effect that the complainant would not be subjected to torture or ill-treatment. On 22 January 2016, the Regional Court dismissed an appeal filed by the complainant against the extradition. On 10 February 2016, the Federal Constitutional Court upheld the Regional Court's decision.[10]

2.6 The complainant indicates that he has exhausted all available domestic remedies.

The complaint

3.1 The complainant claims that his deportation to Belarus would violate his rights under article 3 of the Convention because he would be at personal risk of being persecuted and tortured.

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[5] No additional information is available on his conviction. However, the extradition request of the Belarusian Government refers to charges of unlawfully obtaining, possessing, transferring and selling addictive substances in September 2006.

[6] According to the State party's submission, in total four asylum requests were rejected by the Czech authorities.

[7] As provided for under rule 39 of the European Court of Human Rights' Rules of Court.

[8] In accordance with the Czech Asylum Act, subsidiary protection shall be granted to a foreign national who does not satisfy the criteria for asylum if it has been established in the procedure for granting international protection that a legitimate concern exists in his or her case that if the foreign national is returned to the country of which he or she is a citizen or, if the foreign national is a stateless person, to the country of his or her last permanent residence, he or she would face a genuine risk of serious harm and that he or she is unable or unwilling, due to such risk, to avail himself or herself of the protection of the country of which he or she is a citizen or the country of his or her last permanent residence.

[9] Reference is made to the judgment of 17 October 2013 of the European Court of Human Rights in the case *Budrevich v. the Czech Republic* (application No. 65303/10).

[10] At the time of the first submission of the complaint, the State party argued that it was inadmissible due to non-exhaustion of domestic remedies, pending the decision of the Federal Constitutional Court.

3.2 The complainant fears that, upon return to Belarus, he will be subjected to torture and ill-treatment because of his political views[11] and his support for an opposition presidential candidate, as well as for criticizing Belarus by applying for asylum.

3.3 He further claims that the State party's authorities should not rely on the diplomatic assurances issued by the Government of Belarus and refers to the European Court's jurisprudence in this regard.

State party's observations on admissibility and the merits

4.1 In its preliminary submission of 12 February 2016 on admissibility, the State party contested that the complaint was inadmissible due to non-exhaustion of domestic remedies, as an appeal in the case, submitted by the complainant, was pending before the Federal Constitutional Court.

4.2 On 19 April 2016, the State party further submitted its observations on admissibility and the merits. It noted that the German rules on extradition did not allow a long period of detention and, therefore, pursuant to a decision of 3 March 2016 of the Higher Regional Court of Dresden, the arrest warrant against the complainant was cancelled and, subsequently, the complainant was released from custody.

4.3 The State party remained convinced that, because of the diplomatic assurances given by Belarus regarding the conditions of detention and the practice of adhering to such assurances, the intended extradition of the complainant would have been consistent with the requirements of national, European and international law, as well as the relevant jurisprudence and State practice. The State party also noted that the circumstances that allowed the complainant to receive a subsidiary protection status were not pertinent to that case since the Czech Republic had not received diplomatic assurances from the Government of Belarus.

4.4 The State party requested the Committee to discontinue its consideration of the case, reasoning that the subject matter had become moot following the release of the complainant from custody.[12]

Complainant's comments on the State party's observations

5.1 On 7 September 2016, the complainant commented on the State party's observations with regard to diplomatic assurances and maintained that torture was being used in prisons in Belarus according to reports issued by international human rights monitoring bodies, including the Special Rapporteur on the situation of human rights in Belarus. In the report of the Special Rapporteur to the Human Rights Council at its thirty-second session, he noted the practice of torture in jails and expressed his deep concerns over the death in prison of Y.P., who had committed suicide in protest against the torture and abuse he had suffered during interrogations and his detention.[13]

5.2 Regarding the State party's request to have the case discontinued, the complainant argues that he was released from custody solely because an interim measures request had been granted by the Committee and that if the case were to be discontinued, he would again face the risk of extradition to Belarus. The complainant adds that, although he was released, the relevant decision on his extradition was not modified in a substantial way. To support this argument, he states that the State party failed to recognize the violation of his rights and continued to be convinced that extradition would be consistent with German, European and international law.

[11] The complainant submitted a report of the Civil Rights Defenders on the situation of human rights in Belarus (7 July 2015).

[12] On 9 March 2018, the Committee, acting through its Rapporteur on new communications and interim measures, denied the request of the State party to discontinue the complaint.

[13] Reference is made to A/HRC/32/48.

State party's additional observations

6.1 On 5 August 2016, the State party indicated that the complainant had been arrested, as a result of an Interpol alert issued by the Belarusian authorities, when he entered Germany from the Czech Republic. He was charged with having illegally dealt in narcotics, on repeated occasions, in September of 2006 in Grodno. In October 2006, the complainant had entered the Czech Republic under an assumed name. His real name became known only in December 2009, when confirmation of his fingerprints was received from the Belarusian authorities. The Czech Republic rejected several asylum requests filed by the complainant. On 23 April 2010, the District Court of Pilsen ruled that extradition of the complainant was not permissible, stating that there was good reason to fear that the criminal proceedings against him in Belarus would not be in accordance with articles 3 and 6 of the European Convention on Human Rights.

6.2 The State party notes that, on 26 October 2015, the Higher Regional Court of Dresden decided that the complainant be placed in extradition custody on a temporary basis. The Court based its decision on the fact that the crimes described were extraditable offences and that no grounds were readily apparent that would contravene the extradition. The Chief Public Prosecutor's Office was instructed to request an assurance from the Belarusian authorities that the complainant would be placed in a detention facility in compliance with the European Convention on Human Rights and with the European Prison Rules, as well as with the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules).

6.3 The State party indicates that, on 3 November 2015, the Office of the Prosecutor General of Belarus gave the written assurances, indicating that, if returned, the complainant: would not be extradited to a third State and prosecuted under criminal law without the consent of the responsible German authorities; would not be prosecuted under criminal law for offences not reflected in his extradition request; would be given the opportunity to defend himself, also with the assistance of lawyers; and would not be subjected to torture or ill-treatment. The State party further indicates that the Office of the Prosecutor General of Belarus gave the assurance that the complainant would be placed in a detention facility compliant with international standards for the treatment of prisoners and that the employees of the German Embassy in Belarus would be allowed to visit him in detention.

6.4 The State party further notes that, on 23 November 2015, the Senate of the Higher Regional Court of Dresden issued an extradition order against the complainant. In its decision, the Higher Regional Court relied on the statements in the preliminary extradition warrant as regards the maximum punishment under the criminal law of Belarus that the complainant would face, the legal assessment under German criminal law and on the binding assurances given by the Office of the Prosecutor General of Belarus.

6.5 The State party notes that, on 23 December 2015, upon the request of the complainant, the presiding judge of the Senate of the Higher Regional Court appointed a legal adviser, who filed a complaint on 12 January 2016, appealing the extradition decision. By an order of 22 January 2016, the Senate of the Higher Regional Court dismissed the appeal, noting, inter alia, that no specific evidence had been provided with regard to the complainant's claim that he distributed flyers and thus became subject to persecution; and that the concerns raised by the court-appointed legal adviser were based on assumptions. The Senate referred to the assurances of the Belarusian authorities and stated that there were no indications that the complainant would risk torture or ill-treatment if extradited. Reflecting upon the complainant's status in the Czech Republic, the Senate stated that the Czech authorities had not granted the complainant the legal status of refugee, but had — by way of taking into consideration the decision of the European Court of Human Rights — only granted him tolerated stay and a temporary suspension of removal, thus not contravening the ban on extradition. The Senate further concluded that the complainant should not be expelled, but instead extradited to Belarus for the purposes of criminal prosecution.

6.6 The State party notes that, on 10 February 2016, the Federal Constitutional Court dismissed the complainant's appeal without citing any grounds for its decision. The extradition proceedings were not pursued further following the Committee's request not to

extradite the complainant. By letter of 3 March 2016, the Chief Public Prosecutor's Office of Dresden instructed that the complainant should be released immediately and that the warrant for extradition custody be lifted. On the same day, the Senate of the Higher Regional Court of Dresden set aside the warrant for extradition custody in order to comply with the principle of proportionality. The Government of Belarus was notified of those developments by a note verbale of 11 March 2016. The State party adds that the complainant's current whereabouts are unknown.

6.7 The State party submits that the complaint is ill-founded and reiterates that the complainant's extradition was permissible based on the comprehensive assurances given by Belarus. Reference is made to Committee's jurisprudence in which the person in question must personally be at a foreseeable and real risk of being subjected to torture upon return.[14] The State party notes that the existence of a pattern of gross or mass violations of human rights in a country does not as such constitute adequate reason for determining with sufficient certainty that a particular complainant would, in fact, be in danger of being subjected to torture on return to a particular country.[15] The State party also notes that the grounds must go beyond a mere abstract danger that the person concerned is exposed to a particular risk and that the burden of proof generally falls on the complainant.[16]

6.8 The State party reiterates that, while the complainant referred to numerous reports on the general situation of human rights in Belarus, including reports on torture and ill-treatment, he failed, however, to submit any facts, both in the domestic proceedings and in the complaint proceedings, indicating that there is a foreseeable, real and personal risk of torture. Referring to the complainant's first asylum request, the State party notes that the Czech authorities did not find the claims credible, particularly in relation to his statements that: he was politically active in supporting the opposition; or that he was detained and his vehicle was seized, whereas his house was searched. The State party is convinced that the complainant has failed to substantiate his claim that the Belarusian authorities have fabricated the criminal case against him due to his political activism.

6.9 The State party referred to the criteria established by the European Court of Human Rights and noted that the assurances given in the complainant's case were adequate as regards their substance and that they were sufficiently specific. The State party recalls that, according to these assurances, the complainant, if extradited, will be placed in a detention facility that is compliant with the requirements of the European Convention and it will be possible at any time for representatives of the German Embassy to visit him.

6.10 The State party indicated that, in the course of the many years of collaboration on extradition matters with Belarus, the latter has fully abided by its commitments on assurances, and there were no cases in which Belarus only partially abided. Therefore, in the State party's assessment, the current assurance agreement with Belarus is a reliable mechanism, which also allows regular monitoring by the German Embassy in Belarus.

Complainant's comments on the State party's additional observations

7.1 On 27 March 2017, the complainant submitted that the State party had incorrectly assessed his residency status in the Czech Republic. He explains that he was granted international protection in the form of subsidiary protection there, which should not be considered as a temporary suspension of deportation. By granting this status, the Czech authorities established that there was a risk for the complainant of serious harm upon return, consisting of risks described in sections 14 (a) and (b) of the Czech Asylum Act, consistent with the respective European Union Council directive, namely the risk of torture or inhuman or degrading treatment or punishment in the country of origin.[17] The complainant further notes that a tolerance visa or temporary suspension of deportation is a different type of status, which is not granted as an affirmative decision in an international protection

[14] See, for example, *Abichou v. Germany* (CAT/C/50/D/430/2010), paras. 11.2 and 11.3.
[15] See, for example, *X v. Kazakhstan* (CAT/C/55/D/554/2013), para. 12.3.
[16] See, for example, *X v. Switzerland* (CAT/C/53/D/470/2011) paras. 7.2 and 7.3.
[17] Reference is made to Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, chap. V, art. 15.

procedure and is not linked to the respective European Union Council directive. The complainant notes that, by disregarding this key distinction between a tolerance visa and subsidiary protection, the State party has diminished the international character of the protection that was granted to him by the Czech authorities.

7.2 The complainant notes that his release was made possible following the Committee's request for interim measures, and that the State party's position with regard to his extradition remained the same and is based on the comprehensive assurances received from the Belarusian authorities. He insists that, if returned, he will be at foreseeable, real and personal risk of torture and ill-treatment. Regarding the diplomatic assurances, the complainant notes that the State party did not asses several criteria of the European Court of Human Rights, including: whether the local authorities can be expected to abide by the assurances given; whether there is an effective system of protection against torture in place and a willingness by the authorities to cooperate with international monitoring mechanisms; and whether the reliability of the assurances has been properly examined by the domestic courts of the sending country.

7.3 The complainant provided information supporting his argument on the reported torture and ill-treatment in Belarus as documented and reflected in various reports on the situation of human rights in Belarus.[18]

7.4 Regarding the State party's observation that the complainant would not be expelled but extradited, the complainant notes that it is not relevant in what form he would be forced to return to Belarus since he would be at risk of being subjected to torture and ill-treatment.

Additional submission by the State party

8. On 7 August 2018, the State party, referring to the whereabouts of the complainant, indicated that there was no indication that the complainant was currently residing on its territory.

Issues and proceedings before the Committee

Consideration of admissibility

9.1 Before considering any complaint submitted in a communication, the Committee must decide whether it is admissible under article 22 of the Convention.

9.2 The Committee notes first, that under article 22 (5) (a) of the Convention, it shall not consider any communication unless the same matter has not been, and is not being, examined under another procedure of international investigation or settlement. The Committee recalls that a communication cannot be considered if it has been examined by another procedure of international investigation or settlement if it relates to the same parties, the same facts and the same substantive rights.[19] In this connection, the Committee notes that a case, raising issues concerning the risk for the complainant of forcible return to Belarus, was registered before the European Court for Human Rights, which concluded that the complainant should not be returned to Belarus.[20] The Committee notes, however, that the case in question differs from the present one, as although it related to the same issue and the same complainant, it was submitted against the Czech Republic, whereas the present case is brought against Germany. Therefore, the Committee considers that it is not precluded by article 22 (5) (a) from examining the present communication.

9.3 The Committee recalls next that, in accordance with article 22 (5) (b) of the Convention, it shall not consider any communication from an individual unless it has ascertained that the complainant has exhausted all available domestic remedies. The Committee takes note of the State party's preliminary objection that, at the time of the first submission of the complaint, it was inadmissible due to non-exhaustion of domestic remedies, pending the decision of the Federal Constitutional Court. However, following the final ruling of the Court on 10 February 2016, the State party, in its submission dated 5 August 2016, indicated that all domestic remedies had in fact been exhausted. The Committee, therefore finds that it is not precluded from considering the communication under article 22 (5) (b) of the Convention.

9.4 The Committee recalls that, for a claim to be admissible under article 22 (2) of the Convention and rule 113 (b) of its rules of procedure, it must rise to the basic level of substantiation required for purposes of admissibility.[21] The Committee notes the State party's argument that the complaint is manifestly unfounded, owing to the fact that the warrant for extradition custody has been lifted and the complainant has been released, and that his current location was unknown. In this context, the Committee notes the argument of the complainant that he was released only because of the interim measure granted by the Committee, and that the State party will pursue its decision to extradite him relying on the assurances of the Belarusian authorities.

9.5 Referring to the assurances, the Committee reiterates its general comment No. 4 (2017) on the implementation of article 3 in the context of article 22 and notes that diplomatic assurances from a State party to the Convention to which a person is to be deported should not be used as a loophole to undermine the principle of non-refoulement as set out in article 3 of the Convention, in cases in which there are substantial grounds for believing that he or she would be in danger of being subjected to torture in that State. The Committee notes that, in the past, the Czech authorities had granted the complainant a subsidiary protection status, and extended it multiple times noting that the risk to the complainant of torture or inhuman or degrading treatment in Belarus could not be excluded.[22] In this context, the Committee regrets that the State party put into question the decision taken by the Czech authorities, as well as the ruling of the European Court of Human Rights, which found that the Czech Republic would violate article 13, in conjunction with article 3, of the European Convention on Human Rights by extraditing the complainant to Belarus.

9.6 However, the Committee considers that the case became moot due to the fact that the complainant has been already released and thus, at present, there is no foreseeable, present, personal and real risk that he will be returned to Belarus and tortured or ill-treated. In these circumstances, the Committee considers that the complainant has failed to substantiate, for the purpose of admissibility, the existence of a personal risk of a violation of article 3 of the Convention. Accordingly, and in accordance with article 22 of the Convention and rule 107 (b) of its rules of procedure, the Committee concludes that the complaint is manifestly unfounded. When taking this decision, the Committee is aware that, in any event, the complainant would be able to submit a new case to the Committee against the State party if a new risk for his forcible removal to Belarus occurs in the future.

10. The Committee against Torture therefore decides:

(a) That the communication is inadmissible under article 22 of the Convention;

(b) That the present decision shall be communicated to the complainant and to the State party.

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[18] A/HRC/32/48; A/67/44; Human Rights Watch, *World Report 2013* and *World Report 2016*; Human Rights Centre "Viasna", *Report on the Results of Monitoring Places of Detention in Belarus* (Minsk, 2015); United States of America Department of State, *Belarus 2016 Human Rights Report* (Washington, D.C., 2016); and Freedom House, *Nations in Transit 2016* (country report on Belarus).

[19] See, for example, *N.B. v. Russian Federation* (CAT/C/56/D/577/2013), para. 8.2.

[20] See *Budrevich v. the Czech Republic*.

[21] See, for example, *Z. v. Denmark* (CAT/C/55/D/555/2013), para. 6.3.

[22] Reference is made to CAT/C/BLR/CO/4.